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No. 04-623

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

STATE OF OREGON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Since 1971, Department of Justice regulations implementing the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, have provided that a prescription for drugs covered by the Act is valid only if issued for a "legitimate medical purpose" as part of "professional treatment." 21 C.F.R. 1306.04(a). In 2001, the Attorney General issued an interpretive ruling to clarify that a prescription for the purpose of assisting an individual to commit suicide is not made for a "legitimate medical purpose" for "treatment" within the meaning of Section 1306.04(a). The court of appeals struck down the Attorney General's interpretive rule on the ground that the CSA does not contain "an 'unmistakably clear' indication * * * that it intended to authorize the Attorney General to regulate the practice of physician assisted suicide." Pet. App. 12a. The petition demonstrates (Pet. 20-23) that the court of appeals' ruling represents a dramatic expansion of this Court's decision in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). The consequence of applying *Gregory*'s clear statement rule not just to statutes that implicate the

essential attributes of state sovereignty but to every federal statute that assertedly affects an area of traditional state regulation—even when a State stands alone in its policy judgment—would be to undermine the uniform application of national regulatory schemes by making their content dependent upon the vagaries of state law. That result cannot be squared with this Court's consistent application of the opposite presumption: "[I]n the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) (quoting *Jerome* v. *United States*, 318 U.S. 101, 104 (1943)).

Respondents do nothing to allay concerns about the broad sweep of the court of appeals' ruling. To the contrary, they embrace it. The Court should grant certiorari to review the court of appeals' radical new rule regarding the interplay of state and federal law.

1. a. Oregon suggests that this Court's review is not warranted because the court of appeals' decision applies a purportedly "long-established" rule that "a clear statement of Congressional intent" is necessary whenever federal legislation would "displace" a State's policy in "an area traditionally and historically within the States' regulatory powers." Or. Br. in Opp. 12, 13. Oregon's reliance on *Gregory* for such a proposition (*id.* at 11) is wholly misplaced. *Gregory* stressed that a State's decision as to the qualifications for its own judges—*i.e.*, the composition of its own government—went "*beyond* an area traditionally regulated by the States," and was, rather, a "decision of the most fundamental sort for a sovereign entity." 501 U.S. at 460 (emphasis added). See *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995) (emphasizing the same with respect to *Gregory*). *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002), on which Oregon also relies

(Or. Br. in Opp. 11), similarly involved a fundamental characteristic of state sovereignty, the terms on which the State had consented to suit in its own courts. 534 U.S. at 544. Other courts of appeals, as the petition notes (Pet. 21), have rejected attempts to extend *Gregory* in the manner adopted by the Ninth Circuit and advocated by respondents. See *United States* v. *Lot 5, Fox Grove*, 23 F.3d 359, 362 (11th Cir. 1994), cert. denied, 513 U.S. 1076 (1995); *Gately* v. *Massachusetts*, 2 F.3d 1221, 1230 (1st Cir. 1993), cert. denied, 511 U.S. 1082 (1994).

b. Oregon also invokes (Or. Br. in Opp. 8, 12, 13, 17) a separate clear statement rule based on *Solid Waste Agency* v. *Army Corps of Engineers*, 531 U.S. 159 (2001), but that decision is likewise inapposite here. In *Solid Waste Agency*, the Court applied the doctrine of constitutional avoidance: "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. The "significant constitutional question[]" avoided in *Solid Waste Agency* was whether application of the Clean Water Act to "nonnavigable, isolated, intrastate waters" would be within Congress's Commerce Clause authority. *Id.* at 172-173.

There is no similar constitutionally dubious application to be avoided here. Regulation of the distribution of controlled substances pursuant to the CSA does not "invoke[] the outer limits of Congress' power" or "push the limit of congressional authority" under the Commerce Clause. *Solid Waste Agency*, 531 U.S. at 172-173. This Court has repeatedly upheld federal regulation of the distribution of controlled substances by doctors and pharmacists as within Congress's Commerce Clause authority. *Minor* v. *United States*, 396 U.S. 87, 98 n.13 (1969) (ban on sale of narcotics is within Congress's constitutional power); *Reina* v. *United States*, 364 U.S. 507, 511 (1960) (Congress had "undoubted power to enact the narcotics laws"). See Gov't Br. 14-17, 20-22 and

Reply Br. 3-12, *Ashcroft* v. *Raich*, No. 03-1454 (argued Nov. 29, 2004).

Nor is there some independent constitutional limitation on Congress's power to legislate with respect to medical matters. The court of appeals cited *Linder* v. *United States*, 268 U.S. 5 (1925), as establishing a constitutional prohibition against Congress's legislating in a way that affects "control of medical practice in the states." Pet. App. 10a, 12a. As the petition explains (Pet. 22), however, *Linder* relied upon the *Lochner*-era doctrine that Congress could not employ its enumerated powers to accomplish general goals relating to health and welfare. See *Linder*, 268 U.S. at 17. That doctrine was expressly disavowed in *United States* v. *Darby*, 312 U.S. 100, 115-117 (1941). While respondents cite more recent cases that refer to the States' traditional role in regulating health and medicine (Or. Br. in Opp. 14-15; Rasmussen Br. in Opp. 15-16, 18), none of them suggests that there is a *constitutional* limitation on Congress's ability to exercise the full scope of its enumerated powers simply because it may have some effect on the practice of medicine. Indeed, this Court has applied the CSA in cases where its impact on the practice of medicine and state law was obvious without intimating the existence of any such constitutional limitation. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494-495 (2001) (CSA precludes recognition of a "medical necessity" defense for marijuana use, based on the recommendation of a physician, despite California's determination that marijuana has medical utility); *United States* v. *Moore*, 423 U.S. 122, 139 (1975) (upholding CSA conviction of physician for dispensing controlled substances from his medical practice).

c. Respondents' briefs in opposition confirm the potentially staggering breadth of the court of appeals' clear statement rule. Respondents affirmatively trumpet that under the court of appeals' ruling, a clear statement is required

whenever the federal statute or regulation in question involves an area that is "historically within the States' regulatory powers." Or. Br. in Opp. 13. See Rasmussen Br. in Opp. 15-18. Under that approach, virtually every federal regulation would need a clear statement from Congress, because "the States' regulatory powers" encompass everything not forbidden by the Constitution. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) ("[T]he reserved police powers of the States * * * are plenary unless challenged as violating some specific provision of the Constitution."). Thus, far from establishing that the decision below is a narrow, fact-specific ruling, respondents' briefs underscore its breadth. The Ninth Circuit's departure from decisions of this Court and other courts of appeals on an issue so basic to the allocation of powers between Congress and the States warrants review by this Court.

2. Respondents also suggest (Or. Br. in Opp. 17-18; Rasmussen Br. in Opp. 15-17) that the court of appeals' decision can be supported as an application of the presumption against federal preemption of state law. See Pet. App. 14a-15a. That presumption is unavailing to respondents here because the Attorney General's interpretive ruling does not preempt Oregon's assisted suicide law. When a "state statute is pre-empted by federal law," it is thereby rendered "invalid under the Supremacy Clause of the Constitution." *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280 (1987). As Oregon concedes, however, the Attorney General's interpretive ruling "does not suggest that the [Oregon law] is invalid. He asserts only that his authority over controlled substances allows him to prevent * * * use [of such controlled substances] for purposes authorized by the Oregon law." Or. Br. in Opp. 9 n.7. On that point, Oregon is correct. Oregon's law remains valid and continues to have the effect of "exempt[ing] physicians who comply

with the provisions of the proposed measure from prosecution under [Or. Rev. Stat. §§ 161.605 and 161.625 (2003)]," which otherwise make it a state law felony for anyone, including a physician, to aid a suicide. *Kane* v. *Kulongoski*, 871 P.2d 993, 998 (Or. 1994). Moreover, to the extent doctors in Oregon dispense substances other than those regulated under the CSA to hasten their patients' deaths, the Attorney General's interpretive ruling has no relevance whatsoever to their conduct.

Oregon's de-criminalization law for physician-assisted suicide is no more preempted than California's laws decriminalizing the possession and use of marijuana for medical purposes. But despite their ability to remove parallel and duplicative state-law prohibitions, States are not free to establish state-law exceptions to the federal-law duty to comply with the CSA. See *Oakland Cannabis*, 532 U.S. 494-495 (CSA precludes "medical necessity" defense, despite a California law recognizing marijuana's purported medical utility). The contrary rule that respondents urge would stand the Supremacy Clause on its head, presumptively "preempting" federal law whenever it conflicted with state law.

3. a. The court of appeals' holding that the Attorney General's interpretive rule exceeded his authority was thoroughly infected by its mistaken understanding of the proper framework of analysis and standard of review. For example, the court of appeals refused to defer to the Attorney General's construction of the CSA and implementing regulation because the court mistakenly believed, based on the serious errors discussed above, that the interpretive rule "exceeds the scope of the CSA and ignores the Attorney General's limited role," Pet. App. 22a, and that, under *Solid Waste Agency*, the court was free to "refuse[] to defer to [the Attorney General's] interpretation of its own regulations without clear authority from Congress," *id.* at 23a. Respondents cannot separate the court of appeals' ultimate holding from its flawed starting point.

b. Applying the proper framework of statutory construction and deference to administrative actions, the Attorney General's interpretive ruling is plainly valid. As the petition explains (Pet. 19), the appropriate presumption, even in cases that touch upon areas of traditional state regulation, such as child custody, is that a national federal regulatory scheme does not yield to or depend on state law. See *Mississippi Band of Choctaw Indians*, 490 U.S. at 43, 47. And specifically with respect to the CSA, this Court's precedents already establish that Congress intended the CSA to provide a "comprehensive federal scheme for the control of drug abuse." *Gooding* v. *United States*, 416 U.S. 430, 449 (1974). In *Moore*, the Court recognized that the CSA requires prescriptions to be made "in accordance with a standard of medical practice generally recognized and accepted in the United States." 423 U.S. at 139. And, more recently, in *Oakland Cannabis*, the Court rejected the claim that Californians using marijuana for medical purposes "upon the recommendation or approval of a physician" consistent with California law were thereby exempt from the prohibitions in the CSA, in light of the federal classification of marijuana as a Class I substance with no recognized medical use. 532 U.S. at 486, 490, 494-495.

Respondents' attempts to distinguish those cases are unavailing. Oregon maintains (Or. Br. in Opp. 16-17) that *Moore* is distinguishable because it arose from the District of Columbia, where there was no State law to apply. But nothing in the CSA distinguishes its application in the District of Columbia from elsewhere, and Oregon points to nothing in the Court's opinion to suggest that the site of the crime was relevant to the decision. Indeed, as pointed out in the petition (at 18 n.5), other courts of appeals, in conflict

with the decision below, have adhered to *Moore* and applied a national standard for professional practice under the CSA.

Respondents also suggest (Or. Br. in Opp. 16; Rasmussen Br. in Opp. 8; Patient Br. in Opp. 14) that *Oakland Cannabis* is distinguishable because that case dealt with a drug for which there was *no* accepted medical use. That argument simply ignores the central teaching of *Oakland Cannabis*—that it was the *federal* determination of medical utility that governed, not the contrary *state* determination. Respondents offer no basis in the statutory text for concluding that only the initial scheduling involves a federal determination as to a substance's utility for a legitimate and accepted medical purpose. On respondents' view, California could equally trump federal law with respect to opium and cocaine—Schedule II substances, 21 C.F.R. 1308.12(b)(1) and (4)—instead of marijuana. Indeed, in light of the Attorney General's responsibility under the CSA to ensure an "adequate * * * supply" of Schedule II substances "for legitimate medical * * * purposes," 21 U.S.C. 823(a)(1), the Attorney General would, under respondents' interpretation, be affirmatively *required* to ensure an adequate supply of such substances for whatever uses a particular State decided to recognize. There is nothing in the text of the CSA that requires such an anomalous result. *Moore*, which involved a Schedule II substance (methadone), is to the contrary. See 423 U.S. at 124.

c. Because the court of appeals concluded that state law should define "legitimate medical purpose" under the CSA, it did not address whether the Attorney General's interpretation was correct or entitled to deference as a matter of federal law. See Pet. App. 9a. We have already explained in the petition (at 11-13, 23-26) why the Attorney General's interpretive ruling is entirely reasonable and entitled to deference. Nonetheless, we briefly address a couple of additional points raised by respondents.

Contrary to the arguments of the patient respondents (Patient Br. in Opp. 9-10), this Court's decisions in *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461 (2004); *Barnhart* v. *Walton*, 535 U.S. 212 (2002); *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and *Christensen* v. *Harris County*, 529 U.S. 576 (2000), do not justify decreased deference here. Each of those decisions involved an agency interpretation of statute, rather than an agency's interpretation of its own regulation, which is at issue here, and which is governed by the heightened deference standard stated in *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), and *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Such deference is especially warranted in this case, because respondents do not challenge the validity of the regulation itself, which since 1971 has governed the determination of what prescriptions are valid under the CSA.*

Finally, respondents fail to cast any doubt on the reasonableness of the Attorney General's conclusion that assisting in bringing about a patient's suicide is not a "legitimate medical purpose" for "treatment" within the

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* Respondents contend (Or. Br. in Opp. 14 n.10; Patient Br. in Opp. 15-16) that the phrase "legitimate medical use" in Section 1306.04(a) must refer to state law because when the regulation was promulgated in 1971, the CSA required the Attorney General to defer to state regulators with respect to doctor registration. But Section 1306.04(a) does not address the registration of physicians. Rather, it is a substantive regulation addressing what constitutes a valid prescription under 21 U.S.C. 829, and specifying that distribution without a valid prescription violates the CSA. 21 C.F.R. 1306.04(a). As this Court's decision in *Moore* reflects, 423 U.S. at 139-141, the relevant standard under the CSA for accepted medical practice has always been understood as a national one. See also p. 7, *supra*. Moreover, contrary to Oregon's assertion (Or. Br. in Opp. 14 n.10), a doctor's registration could always be revoked for violation of the CSA, though, prior to 1984, this required that the doctor first be convicted of a violation. See S. Rep. No. 225, 98th Cong., 1st Sess. 266 (1983).

meaning of that regulation. Respondents cannot deny that the ethical guidelines of the American Medical Association specifically provide that "[p]hysician assisted suicide is fundamentally incompatible with the physician's role as healer," a view that is shared by 49 of the 50 states. American Medical Association, *Current Opinions of the Council of Ethical and Judicial Affairs, E-2.211, Physician-Assisted Suicide*, <http://www.ama-assn.org/ama/pub/category/print/8459.html> (last visited Jan. 24, 2005). Indeed, the legislative history of the CSA demonstrates that Congress itself regarded the use of controlled substances to commit suicide as a serious problem of drug abuse. See Pet. 23-24 (citing H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1 (1970)).

In short, without the court of appeals' fundamentally flawed reliance on clear statement rules and a presumption against preemption that have no application here under decisions of this Court and other courts of appeals, the court of appeals' holding cannot survive scrutiny.

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For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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